



**Fw: CWA, Section 401(a)(1) requirements**  
**Hudson Slay** to: David Albright

02/22/2010 10:11 AM

Hi David,

I thought you would be interested in the information below from Ed Chen. I get the impression that he has decided what is needed (EPA determination of CWA jurisdiction) before DOH could use their 401 authority for the Lahaina injection wells but I'm not clear if this is an issue for DOH management or not.

I'll give you a call and try to explain my conversation with Ed.

Hudson

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Hudson Slay  
U.S. Environmental Protection Agency  
PICO  
300 Ala Moana Blvd, Room 5-152  
P.O. Box 50003  
Honolulu, Hawaii 96850  
Phone: (808) 541-2717  
Fax: (808) 541-2712  
[slay.hudson@epa.gov](mailto:slay.hudson@epa.gov)

----- Forwarded by Hudson Slay/R9/USEPA/US on 02/22/2010 08:08 AM -----

From: "Chen, Edward" <[edward.chen@doh.hawaii.gov](mailto:edward.chen@doh.hawaii.gov)>  
To: Hudson Slay/R9/USEPA/US@EPA  
Date: 02/19/2010 02:43 PM  
Subject: RE: CWA, Section 401(a)(1) requirements

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Good Afternoon, Mr. Slay:

Is Lahaina's effluent (the "pollutant") "discharged" into Navigable waters (? by CWA definition) or is it discharged into ground water (receiving State waters) than being transferred with/from the ground water into Navigable waters (Pacific Ocean, State waters classified as "Open Coastal Waters). Please note CWA content using term "ground water" to separate ground water from Navigable waters when ground water is involved.

EC

**From:** [Slay.Hudson@epamail.epa.gov](mailto:Slay.Hudson@epamail.epa.gov) [<mailto:Slay.Hudson@epamail.epa.gov>]  
**Sent:** Friday, February 19, 2010 1:48 PM  
**To:** Chen, Edward  
**Subject:** Fw: CWA, Section 401(a)(1) requirements

So is Section 401 (a)(1) where you see a problem? It says 'may' result in any discharge into navigable waters but you still believe EPA needs to establish that the discharge is indeed to navigable waters? Perhaps I misunderstood what you were saying yesterday. Let me know if I've missed something.

Hudson

----- Forwarded by Hudson Slay/R9/USEPA/US on 02/19/2010 01:41 PM -----

From: "Penn, David C" <[david.penn@doh.hawaii.gov](mailto:david.penn@doh.hawaii.gov)>  
To: "Chen, Edward" <[edward.chen@doh.hawaii.gov](mailto:edward.chen@doh.hawaii.gov)>

Content: "Wong, Alec Y" <[alec.wong@doh.hawaii.gov](mailto:alec.wong@doh.hawaii.gov)>, "Seto, Joanna L" <[joanna.seto@doh.hawaii.gov](mailto:joanna.seto@doh.hawaii.gov)>, "Tsuji, Michael" <[Michael.Tsuji@doh.hawaii.gov](mailto:Michael.Tsuji@doh.hawaii.gov)>, "Edward G Bohlen" <[EBohlen@doh.hawaii.gov](mailto:EBohlen@doh.hawaii.gov)>, "Hew, Chauncey L" <[chauncey.hew@doh.hawaii.gov](mailto:chauncey.hew@doh.hawaii.gov)>, "Pruder, Sina L" <[sina.pruder@doh.hawaii.gov](mailto:sina.pruder@doh.hawaii.gov)>, "Okubo, Watson T" <[watson.okubo@doh.hawaii.gov](mailto:watson.okubo@doh.hawaii.gov)>, "Lau, Laurence K." <[laurence.lau@doh.hawaii.gov](mailto:laurence.lau@doh.hawaii.gov)>, "Hasegawa, Jan K." <[jan.hasegawa@doh.hawaii.gov](mailto:jan.hasegawa@doh.hawaii.gov)>, "Lum, Marshall H" <[marshall.lum@doh.hawaii.gov](mailto:marshall.lum@doh.hawaii.gov)>, "Koch, Linda A" <[linda.koch@doh.hawaii.gov](mailto:linda.koch@doh.hawaii.gov)>, "Remnek, Alexandre" <[Alexandre.Remnek@doh.hawaii.gov](mailto:Alexandre.Remnek@doh.hawaii.gov)>, "Kinchla, Renee" <[renee.kinchla@doh.hawaii.gov](mailto:renee.kinchla@doh.hawaii.gov)>, "Honda, Myron" <[Myron.Honda@doh.hawaii.gov](mailto:Myron.Honda@doh.hawaii.gov)>, "Haae, Glenn" <[glenn.haae@doh.hawaii.gov](mailto:glenn.haae@doh.hawaii.gov)>

Date: 02/04/2010 10:36 AM  
Subject:

Subject: RE: CWA, Section 401(a)(1) requirements

Good morning Mr. Chen,

The attached unanimous opinion of the United States Supreme Court in the 2006 *S.D. Warren* case, which defined the meaning of "discharge" for purposes of Section 401, upholds the states' broad authority under Section 401 to condition federal licenses and permits that can impact water quality. In the attached version of the opinion I highlighted some passages that helped me to understand how it might apply to the Lahaina injection wells situation.

Regards,  
Dave  
20100204

David C. Penn  
TMDL Coordinator, Environmental Planning Office  
State of Hawaii Department of Health  
Phone (808) 586-4337, Fax (808) 586-4370  
[david.penn@doh.hawaii.gov](mailto:david.penn@doh.hawaii.gov)  
[www.hawaii.gov/health/epo](http://www.hawaii.gov/health/epo)

-----Original Message-----  
**From:** Chen, Edward

**Sent:** Tuesday, December 08, 2009 7:49 AM

**To:** Penn, David C

**Cc:** Arizumi, Thomas E; Wong, Alec Y; See, Tomas S; Seto, Joanna L; Tsuji, Michael; Edward G Bohlen; Hew, Chauncey L; Pruder, Sina L; Okubo, Watson T; Chen, Edward

**Subject:** CWA, Section 401(a)(1) requirements

Good Morning, Dr. Penn:

For clarification and records, Section 401 WQC certifies the “discharge.” Please read CWA, Section 401(a)(1) below (emphasis added in red):

SEC. 401. (a)(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the State shall so certify, except that any such certification shall not be deemed to satisfy section 511(c) of this Act. . . “

CWA, 502:

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces”

within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purpose is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

In the State of Hawaii, we use the term "Water Pollutant" as defined in HRS, 342D-1 (which is more stringent) instead of the term "pollutant."

"Water pollutant" means dredged spoil, solid refuse, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, soil, sediment, cellar dirt and industrial, municipal, and agricultural waste.

Regards,

E. Chen  
12/08/09